HERBERT SMITH FREEHILLS

LITIGATION QUARTERLY UPDATE E-BULLETIN

England and Wales | SEPTEMBER 2023

Welcome to our latest quarterly e-bulletin which contains updates on commercial litigation developments, largely by reference to articles posted to our Litigation Notes blog. Visit the blog to view and search our full set of posts on commercial litigation topics, or subscribe to be notified of the latest updates: https://hsfnotes.com/litigation/

In this quarter we have also released:

- a further episode of our regular Commercial Litigation Update podcast, which discusses some of the developments covered in this e-bulletin; and
- a further episode of our podcast series on Class Actions in England and Wales, this time examining employment class actions.

LITIGATION FUNDING

At the end of July, in a decision which took many by surprise, the Supreme Court held that third party litigation funding agreements which provide for the funder to be paid a share of any damages recovered by the claimant are "damages-based agreements" (or DBAs) and therefore unenforceable unless they comply with the regulatory regime for such agreements. Since participants in the litigation funding market had generally assumed that their agreements were not DBAs, and therefore did not need to comply, the effect of the decision was to render most litigation funding agreements unenforceable: Supreme Court decision today means most existing UK litigation funding agreements likely to be unenforceable.

We understand that, since the decision was handed down, funders have been busy renegotiating their agreements with claimants to seek to ensure that they either fall outside the definition of a DBA (which seems the only option where the funding agreement relates to opt-out collective proceedings in the Competition Appeal Tribunal (CAT), since DBAs are prohibited in that context) or comply with the relevant DBA regulations. The effectiveness of such efforts is likely to be tested in ongoing cases in the CAT since the ability to fund the proceedings, and any adverse costs order, is a pre-requisite for a claim to be certified as collective proceedings in the CAT.

ENVIRONMENTAL LITIGATION

In our last quarterly update, we reported on the High Court's decision refusing permission for ClientEarth to continue a derivative action in relation to Shell PLC's directors' handling of the company's strategy in relation to climate risk. The court has since reconfirmed that decision following an oral hearing, agreeing that ClientEarth had failed to establish a prima facie case for granting permission as required by the relevant statutory regime: High Court confirms refusal of permission for ClientEarth derivative action against Shell directors.

Taken together, the two judgments show how difficult it is likely to be for environmental and other campaign groups to use the derivative action procedure to challenge directors' strategic or long-term decision making. That is in part because the court will not generally interfere in company management decisions, particularly where they require directors to balance competing considerations – including, as the latest judgment clarifies, decisions as to how a strategy should be implemented as well as what strategy should be adopted.

The judgments also show that the court is unlikely to grant permission for a derivative action where it considers that the action has been brought for an ulterior purpose – which may be a ready inference where the applicant is a campaign group with a small shareholding.

The High Court judge has refused ClientEarth's application for permission to appeal the decision, but it may seek permission directly from the Court of Appeal.

CONTRACT

In early July the Supreme Court handed down its seminal judgment in *Philipp v Barclays Bank UK plc* confirming that the so-called *Quincecare* duty on financial institutions arises specifically where an agent of the customer purports to give a payment instruction and the bank has reasonable grounds for believing that it is an attempt to defraud the customer. It therefore does not arise in the context of an "authorised push payment" fraud, in which the victim is induced to authorise their bank to send a payment to a bank account controlled by the fraudster: Supreme Court clarifies so-called Quincecare duty on financial institutions executing customer payments.

Recent months have also seen two interesting High Court decisions illustrating how the courts will interpret contractual exclusion or limitation clauses, both of which highlight the importance of clear drafting. In the first, the court found that a contractual limitation clause imposed an aggregate cap rather than separate caps for each claim: Liability caps: importance of clear drafting. In the second, it held that a claim for lost charges arising from an alleged breach of an exclusivity clause fell within a clause excluding "anticipated profits": Exclusion clauses: High Court finds claim for "charges unlawfully avoided" fell within contractual exclusion for loss of anticipated profits

JURISDICTION, ENFORCEMENT AND FOREIGN LAW

In recent months there have been a couple of interesting decisions on jurisdiction and enforcement relating to consumer and employee protection provisions.

In the first, the High Court granted an anti-suit injunction to prevent a US employer continuing New York proceedings against an English-domiciled employee in a dispute about entitlement to bonus payments. The decision confirms that an English court will ordinarily grant an anti-suit injunction to protect a UK-domiciled employee's right to be sued by their employer only in the UK, regardless of where the employer is domiciled, similar to the position under the EU-wide jurisdiction regime that applied to the UK pre-Brexit: Anti-suit injunction granted to protect English-domiciled employee's right to be sued only in English court and prevent US employer suing in New York.

In the second, the High Court refused to enforce a foreign-seated arbitration award on the grounds that to do so would be contrary to public policy, including because it was contrary to certain protections provided under the Consumer Rights Act 2015 (CRA) which the judge held were an expression of UK public policy. The case suggests that businesses may have difficulties enforcing foreign judgments or arbitral awards against consumers in the UK where the underlying contract had a close connection to the UK and the decision applied a (contractually agreed) foreign governing law without reference to the CRA: Commercial Court takes rare decision to refuse enforcement of arbitration award on public policy grounds in crypto case.

There has also been an interesting Privy Council decision which clarifies the approach an appeal court is likely to take where there is a challenge to findings of foreign law (which are treated as findings of fact, as a matter of English law). The decision suggests that the less similar the relevant foreign system of law is to domestic law, the more hesitant an appeal court is likely to be to intervene: Appeals against findings of foreign law: Privy Council explains spectrum approach.

PRE-ACTION, ADR AND "WITHOUT PREJUDICE" PRIVILEGE

In late July the government announced that it is proceeding with plans to introduce compulsory mediation as a mandatory procedural step in all County Court claims which are allocated to the Small Claims track (ie most claims valued below £10,000). This is the first stage of a plan to integrate a mandatory mediation step into County Court claims within the fast-track (£10,000-25,000) and multi-track (over £25,000): UK government confirms plans for compulsory mediation in the County Court and decides against statutory regulation of the mediation sector.

In August, a Civil Justice Council (CJC) working group recommended substantial changes to the regime of pre-action protocols (PAPs) which parties are expected to follow before civil proceedings are commenced in the English courts. Most controversially, the report proposes that the current pre-action obligation to consider whether the dispute could be resolved without litigation should be replaced by an express obligation to undertake a pre-action mediation or some other dispute resolution process, with a default requirement of an inter-party meeting. The working group will, however, consider in the second phase of its review whether a more flexible bespoke PAP should be created for complex commercial cases in the Business & Property Courts: Pre-action protocols: Civil Justice Council recommends mandatory pre-action ADR but will consider a more flexible bespoke protocol for commercial cases.

In a decision in September, the High Court held that inter-solicitor correspondence about the possibility of engaging in ADR was not properly to be regarded as "without prejudice" (or WP), despite being marked as such, and was therefore admissible in relation to costs. The decision is of interest in part for the court's comment that correspondence about the possibility of engaging in ADR (as distinct from communications within an ADR process) is "more likely to be open than without prejudice", as the parties will often wish to be able to rely on it later: Correspondence about possibility of ADR was not "without prejudice" despite being marked as such. That is consistent with the approach taken in the CJC's report referred to above, which proposes that the court should be able to see communications regarding proposals to engage in a pre-action dispute resolution process, and evidence of the fact that the process took place, but not anything that discloses the substance of the negotiations.

PART 36 OFFERS AND SETTLEMENT

In a recent decision the High Court held that a claimant who made a very high Part 36 offer should be deprived of the benefits that are ordinarily available to a claimant who beats their own offer, as the offer was not a genuine attempt to settle. The decision contrasts with a number of cases where the courts have upheld very high claimant offers, illustrating that the court's assessment will be highly fact-specific and an important question will be whether the level of the offer was justified by the perceived strength of the claim at the time of the offer: Part 36 offers to settle: very high claimant offer did not bring costs benefits as not a genuine attempt to settle.

There has also been an interesting Court of Appeal decision regarding the circumstances in which a court may decline to accept undertakings agreed between the parties to a settlement agreement. While the decision confirms the court's discretion to do so, it emphasises that proper weight must be given to the public interest in encouraging parties to settle their disputes in the confidence that the settlement terms will be upheld: Court of Appeal provides guidance as to when court may refuse to accept party's undertakings as part of settlement.

Key contacts

Alan Watts
Partner
T +44 20 7466 2076
E alan.watts@hsf.com

Maura McIntosh
Professional support consultant
T +44 20 7466 2608
E maura.mcintosh@hsf.com

Jan O'Neill
Professional support lawyer
T +44 20 7466 2202
E jan.oneill@hsf.com

For a full list of our global offices visit **HERBERTSMITHFREEHILLS.COM**